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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/667,559	09/22/2003	Hubert Kurzinger	12742.0005USI1	9973

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EXAMINER	
SAYALA, CHHAYA D	
ART UNIT	PAPER NUMBER
1761	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/10/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/667,559	KURZINGER ET AL.	
	Examiner	Art Unit	
	C. SAYALA	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *17 October 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-37* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-37* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

1. Claims 23-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baensch (US Patent 3796812) and Bunch (US Patent 5618574) in view of Kim (US Patent 5773051) and further in view of Ronai et al. (US Patent 4103034) taken with Johnson (US Patent 5936069) or Graham et al. (US Patent 3450540), Kruse (US Patent 2952540).

Baensch teaches a fish-feed composition that includes yeast as one of its ingredients. Note that the feed is in the form of a sheet of "thin-walled thickness". Additionally, the reference teaches the flake thickness at col. 2, line 40, which thickness size falls within the claimed range (0.1 to 1.0 mm). At col. 2, lines 15-20, patentee teaches that it is possible to break the sheets into smaller pieces prior to feeding. The patent does not teach the moisture content or the diameter size of the smaller pieces or the shape.

Bunch enumerates the ingredients, that include vitamins, in a number of commercial fish feeds, which include flaked feeds (col. 1, line 26). See col. 3 that

teaches conventional ingredients, which includes yeast and bacteria. The patent also teaches growth promoting ingredients. See col. 4, lines 57-60.

Kim teaches fish feed which contains glucose among other conventional ingredients for a fish feed, which floats after sinking. The feed is flake-type (col. 2, line 34) has a water content of 15-25%, the diameter of the flake is 1-10 mm, which falls within the claimed range. Note the temperature-sensitive ingredients at Table I.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to break the sheets into pieces to a diameter taught by Kim and to incorporate the conventional ingredients along with yeast and bacteria, shown to be useful growth promoters.

The shape of the flaked feed is not taught by the prior art but this feature would be considered as a matter of personal choice of the artisan since fish by themselves have no preference to shape and neither can they distinguish such features. Also, Baensch teaches the various shapes of the sheet form at col. 1, lines 65-69 and to break this down into pieces, as taught by the patentee, and to maintain these same shapes would have required no more than ordinary skill. Note that the patents are all drawn to fish feed and Bunch teaches that flaked feeds are conventional forms of fish feed in the art, and therefore, the methods of feeding aquatic animals is rendered obvious. Although none of the above references teaches the size of the flake and the moisture content as well as the inclusion of temperature sensitive compounds such as flavors, Ronai et al. establish that to make flakes with all 3 limitations was known in the art at the time the invention was made and to incorporate such in a fish feed would have

been prima facie obvious so that the flake can float to benefit the fish. In this regard, Ronai et al. disclose a flaked protein material which has a thickness .06-.001 inch (col. 7, line 47) and a moisture content of 12-25% (col. 8, lines 8-10). See claim 6. Claim 1, part (c) shows a size 1" to .04". Note col. 7, lines 9-10 which discloses colors and flavorants, which are inherently temperature-sensitive.

Double Patenting

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

Claims 23-24 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-2 of copending Application No. 11/377890. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Response to Arguments

Applicant's arguments filed 10/17/2006 have been fully considered but they are not persuasive.

At page 3, applicant has described the invention. He states the meaning of "uniformity" is "uniform size and shape". He states that the extruder temperature is 80 degrees Celsius. He gives further information regarding the method of making the flakes .

The claims are to "feeding the fish". Applicant claims uniform size and shape, but claims a thickness between 10-350 microns as well as a specific moisture content. The flakes have a diameter of 1-100 mm and temperature-sensitive materials. It is known in the food art to make flakes of the thickness and moisture content claimed herein. Additionally, fish feed flakes containing temperature-senstive materials have been patented. In following prior art disclosures, with the motivation to make flakes that are thinner, one of ordinary skill in the art would have realized the "advantages" listed at page 4 of his remarks.

At page 4, applicant has criticized Bunch for relating to fish feed that contains insects and states that only the background information shows flaked feed. The rejection uses Bunch only for its background information. It is well established that all of the disclosure must be considered and therefore, even the background information of a reference is pertinent.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. SAYALA whose telephone number is 571-272-1405.

The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for

published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

C. SAYALA
Primary Examiner
Group 1700.